NO. 53280-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL SAMUEL HUDSON JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01732-9

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

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STATEMENT OF THE CASE

Michael Hudson (hereafter 'Hudson') was charged by fourth amended information with four counts of Rape of a Child in the First Degree (Domestic Violence) committed against his daughter, C.J.H; one count of Rape of a Child in the First Degree (Domestic Violence) committed against his son, M.S.H.; four counts of Sexual Exploitation of a Minor (Domestic Violence) committed against C.J.H; and one count of Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree committed against C.J.H. CP 2–5; RP 18–19.

In early 2014, Hudson came to the attention of the Pierce County Sheriff's Department. CP 50, 52; RP 71, 73. The Department had been alerted to communications of a sexual nature between Hudson and another individual in the jurisdiction which led the police to believe Hudson might be sexually abusing his children. CP 50, 52; RP 71,73. In these communications, Hudson and another adult planned a "meeting between them in which Hudson would meet a child that [the other adult] had been molesting." CP 50. The two of them communicated over the course of four

months, during which they exchanged accounts of molesting children, including Hudson's account of "sexual contact with his own children." CP 50. As a result of the investigation, Hudson underwent both a polygraph and a psychosexual evaluation. CP 50, 52.

Three years later, on August 4, 2017, Vancouver Police Sergeant Joe Graafe received a cybertip from the National Center for Missing and Exploited Children regarding recent use of an email account, belonging to Hudson, to transmit illicit depictions of a minor. CP 39. After investigating the tip, Sergeant Graafe determined that the girl in the images was Hudson's daughter, C.J.H. CP 39. Sergeant Graafe then developed probable cause and obtained a search warrant, which was served on Hudson and the home the child resided in on August 5, 2017. CP 39–40. During a mirandized interview, Hudson confessed to producing the exploitative images of his daughter and trading the images with other people on the internet. CP 40. He also admitted that he had been abusing her since she was two years old. CP 40.

During the second investigation, both of Hudson's children underwent forensic interviews conducted at the Children's Justice Center in Vancouver. CP 42–44. During her interview, C.J.H. confirmed the abuse, stating, "My dad made me have sex with him." CP 43. She told the interviewer that it happened multiple times. CP 43, 44. She also told the

interviewer that on one occasion, when she and her brother, M.S.H., asked to go swimming at the local pool, Hudson forced them to "[h]ave sex to earn the pool." CP 43.

During his interview, M.S.H. independently relayed the same story about the pool. CP 42. M.S.H. said that it was really hot that day, so he and his sister wanted to go swimming at the pool across from their residence. CP 42. Hudson told M.S.H. that if they wanted to go swimming, M.S.H. and C.J.H. would have to have sex. CP 42. Hudson watched as his two young children were forced to have intercourse. CP 42. M.S.H. told the interviewer he was only four when this happened. CP 42.

As part of a plea agreement, Hudson pled guilty to all ten counts, as well as to the facts supporting convictions on all ten counts. CP 15–17. The parties stipulated in the plea agreement that Mr. Hudson is a sex offender subject to the indeterminate sentencing scheme provided in RCW 9.94A.507. CP 65. Additionally, the defendant's statement on plea of guilty which Hudson signed included notice that the sentencing judge could exercise his discretion to impose an exceptional sentence if the judge were to find it appropriate and that the Indeterminate Sentence Review Board might also recommend an increase in the minimum term of confinement if the Board determined that Hudson were more likely than

not to re-offend upon release. CP 9–10. Notice that the judge could impose various conditions of community custody was also provided. CP 10.

Although the Department of Corrections, as a result of its pre-sentence investigation, did not recommend an exceptional sentence, it did recommend a prohibition on the possession or consumption of alcohol by Hudson during custody. CP 53.

M.S.H. submitted a written victim's impact statement in which he said:

> Dear Judge,
>
> I hate dad. I feel pissed off about my dad. He messed up my life, he messed up my family's life.
>
> Because of what happened to me by him, have PTSD now, an I'm taking two types of medication because of my anger issues. I get mad a lot, I fight with my sister, sometimes I kick and hit my mom, and she has to pin me down to keep me safe. I hit my teacher and cuss at school and my house, I run away at school sometimes. I am in counseling now because of these things.
>
> I feel we will be safer if he is in jail, but I don't think twenty years is enough, I hope he is in jail for life.
>
> Thank you for listening,
>
> [M]

CP 44–45.

At the February 20, 2019 sentencing hearing, Pam Ogren, M.S.H. and C.J.H.'s maternal grandmother, delivered a statement, informing the

court that the impact of this crime on M.S.H. and C.J.H. is significant and opining that it will likely affect them for years to come. RP 53–55.

At the second sentencing hearing on March 18, 2019, the court relied on aggravating factors found in RCW 9.94A.535 and nonstatutory aggravating factors to determine the exceptional minimum sentence of 365 months for each of the first five counts. CP 61. These factors were gleaned from the record provided in the August 2, 2018 9A.44.120 child hearsay decision, as well as from findings made during the February 20, 2019 sentencing hearing. CP 60–61. The sentencing court cited, *inter alia*, "historical review of [Hudson's] criminal behavior, deliberate cruelty, particularly vulnerable victims, [] ongoing effects of the depraved behavior, images on the web for perpetuity as far as all of us know." CP 61; RP 65. Furthermore, the court provided that, if valid, any of the aggravating factors in its findings would singularly justify the exceptional sentence. CP 61.

As a condition of Hudson's community custody following confinement, the trial court imposed a prohibition of Hudson's possession and consumption of alcohol. CP 79.

This appeal timely follows.

ARGUMENT

I. The trial court properly sentenced Hudson.

Hudson argues the trial court exceed its statutory authority in sentencing Hudson to an exceptional sentence based on aggravating factors found in RCW 9.94A.535(3) – a section typically reserved for jury findings. The State agrees that while the Court did not violate Hudson's constitutional rights by engaging in judicial fact-finding as such is allowed in a sentence under RCW 9.94A.507, the Court erred in making findings of fact that are statutorily reserved for the jury. However, the trial court did not err in sentencing Hudson because it was allowed to base the low end of Hudson's indeterminate sentence based on valid aggravating factors our legislature has not required a jury find. Accordingly, Hudson's sentence was proper and this Court should affirm it.

When an offender is sentenced under RCW 9.94A.507, the judge sets a minimum term and a maximum term, thus giving the offender an indeterminate sentence. The maximum term is always the statutory maximum for the crime under sentence. RCW 9.94A.507(3)(b). The minimum term is either a sentence within the standard sentencing range for the crime under sentence, or an exceptional sentence based on RCW 9.94A.535. RCW 9.94A.507(3)(c). The legislature set forth some

aggravating and mitigating factors a judge could consider when sentencing someone to an exceptional sentence in RCW 9.94A.535. There are factors the court may consider, RCW 9.94A.535(2), and factors that must be determined by a jury. RCW 9.94A.535(3); RCW 9.94A.537. There are also non-statutory aggravating factors a judge may consider in setting a sentence. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002); *State v. Wright*, 184 Wn.App. 1024 (Div. 2, 2014).[1]

While case law has held that judges may engage in judicial fact-finding to support an exceptional sentence without violating *Blakely v. Washington*'s jury finding requirement in an indeterminate sentencing scheme, our legislature has specifically set forth that a jury must find certain aggravating factors and therefore even the case law typically relied upon does not give the judge the statutory authority to engage in certain fact-finding. *See State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006); *State v. Borboa*, 157 Wn.2d 108, 135 P.3d 469 (2006); and *State v. Mehlhaff*, 158 Wn.2d 363, 143 P.3d 824 (2006). The judge may still engage in fact-finding for certain aggravating factors, as set forth in RCW 9.94A.535(2), and non-statutory factors, but a jury must find the aggravating factors set forth in RCW 9.94A.535(3), .537.

[1] This case is unpublished. GR 14.1 allows for citation to unpublished cases of the Court of Appeals issued on or after March 1, 2013. This case is not binding precedent on this Court and may be afforded as much persuasive value as this Court chooses.

In the case at bar, the trial court engaged in judicial fact-finding, finding the defendant used his position of trust or confidence to facilitate the commission of the crimes charge, the defendant knew or should have known the victims were particularly vulnerable or incapable of resistance, that the defendant's conduct manifested deliberate cruelty to the victims, that the crimes were part of an ongoing pattern of abuse, that the crimes were domestic violence crimes and were part of an ongoing pattern of abuse. CP 61. These aggravating factors are all found in RCW 9.94A.535(3), including (3)(n), (3)(b), (3)(a), (3)(g), and (3)(h)(i). This subsection (3) requires that a jury make the factual findings that these aggravating factors are present. However, the trial court also found nonstatutory aggravating factors including that the crimes committed had a lasting and severe negative impact on the mental health of the victims, that the sexual abuse was pervasive, and that the defendant continued his criminal acts after he became aware of a police investigation into his abuse of the victims. CP 61. These aggravating factors are not listed in RCW 9.94A.535, and therefore do not fall within .535(3)'s requirement that a jury make these findings.

The SRA contains a list of aggravating and mitigating factors that the court may consider in exercising its sentencing discretion. *Fowler*, 145 Wn.2d at 404; RCW 9.94A.535. However, this list is not exclusive. *Id*.

The aggravating factors used by the court, however, must relate to the crime and make it more or less egregious. *Id*. The reasons relied on for deviating from the standard sentencing range must "'distinguish the defendant's crime from others in the same category.'" *Id*. at 405 (quoting *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993)). The nonstatutory aggravating factors used by the court in Hudson's case are related to the crimes and show how the defendant's behavior is distinct from others in the same category of crimes.

The legislative intent of the SRA's exceptional sentence provision was to "authorize courts to tailor the sentence – as to both the length and the type of punishment imposed – to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." *In re Postsentence Petition of Smith*, 139 Wn.App. 600, 603, 161 P.3d 483 (2004) (citing *State v. Bernhard*, 108 Wn.2d 527, 741 P.2d 1 (1987), *overruled in part on other grounds by State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989)). Here, the trial court used its legislative and constitutional authority to tailor the sentence imposed on Hudson to fit Hudson's crimes. This is the exact intent of the legislature: that judges have sufficient discretion to tailor sentences to the facts of the case.

Additionally, while the trial court did improperly find certain aggravating factors as discussed above, the court made the specific finding

that any one of the aggravating factors it found, including the nonstatutory aggravating factors, would have sufficed, by itself, to justify the sentence the court gave and that the court would have given the same sentence if even only one of the aggravating factors was valid. CP 61. Therefore, even though the State concedes the trial court improperly relied upon several aggravating factors from RCW 9.94A.535(3), the court had several other valid aggravating factors it found to support Hudson's sentence. Accordingly, the sentence is valid and should be affirmed.

Hudson only challenges the trial court's statutory authority to make judicial fact-finding when RCW 9.94A.535(3) requires a jury make the relevant finding. The State agrees with this argument of Hudson's. However, Hudson fails to acknowledge that there are several nonstatutory aggravating factors the trial court considered that do not fall under the jury-finding requirement of RCW 9.94A.535(3) and RCW 9.94A.537. These factors justify Hudson's sentence, and Hudson does not challenge the validity of these aggravating factors. As such, that is not an issue for this Court to address on appeal. Hudson's sentence was properly entered by a court with the authority to enter such a sentence. Hudson's claim, while it does not fail, does not result in the remedy of resentencing. As the trial court entered a finding that any aggravating factor would support its sentence, and that the court would have given the same sentence even if all

but one of the aggravating factors it found were invalid, this Court can rest assured that the trial court's sentence would not change on remand for the court to only consider the three valid, nonstatutory aggravating factors. Remand is not necessary, and Hudson's sentence should be affirmed.

II. The trial court properly imposed the community custody condition prohibiting alcohol possession.

For the first time on appeal, Hudson argues that the community custody condition that he be prohibited from possessing alcohol is erroneous because the possession of alcohol does not directly relate to the crime for which he was convicted. *See* Br. of App. 4–6. Citing *State v. Jones*, Hudson argues that although a sentencing court can prohibit use of alcohol, regardless of whether alcohol use contributed to the crime of conviction, prohibiting possession of alcohol was improper. *State v. Jones*, 188 Wn.App. 199, 207, 76 P.3d 258 (2003); Br. of App. 5, n. 1.

Under RCW 9.94A.703, a court is required to impose conditions when sentencing a person to a term of community custody. The same statute provides a list of conditions which are mandatory, those which are discretionary, and those which are waivable. *Id.* Subsection (3)(e) provides that an order to "[r]efrain from possessing or consuming alcohol" is among the discretionary conditions a court may impose. *Id.* "The State need not establish that the conduct being prohibited directly caused the

crime of conviction or will necessarily prevent the convict from reoffending." *State v. Peters*, 10 Wn.App.2d 574, 581, 455 P.3d 141 (2019) (citing *State v. Nguyen*, 191 Wn.2d 671, 685, 425 P.3d 847 (2018)).

Conditions of community custody are reviewed for an abuse of discretion. *State v. Johnson*, 460 P.3d 1091, ¶30 (2020) (citing *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007)). "An abuse of discretion occurs when a trial court's imposition of a condition is manifestly unreasonable." *Id.* (citing *Nguyen*, 191 Wash.2d at 678, 425 P.3d 847).

The court did obtain and consider a presentence report in Hudson's case, unlike the sentencing court in the *Jones* case. CP 34–55; 188 Wn.App. 199, 209, 76 P.3d 258 (2003). In that report, alcohol was mentioned as a factor in Hudson's discharge from the Army. CP 48. Hudson also shared during his evaluation that he began using alcohol at age 16 and that he would drink to the point of passing out "about five times a year." CP 50. As a result of the presentence investigation, the Department of Corrections recommended that Hudson refrain from possessing or consuming alcohol. CP 53. When considering the nature of the crime and the possibility for re-offense upon release to community custody, the court had the facts of the prior proceedings as well as the

presentence report to consider in determining the appropriate conditions of community custody. Given the severity of the crimes to which Mr. Hudson pled guilty as well as the recommendations of the Department of Corrections, the court properly exercised its discretion when imposing the condition that Mr. Hudson refrain from possessing alcohol.

In addition, Hudson agreed, as part of his plea agreement, to the imposition of this condition and agreed that it was crime-related. CP 22. Hudson cannot now challenge this condition as unrelated to the crime. *See State v. Casimiro*, 8 Wn.App.2d 245, 438 P.3d 137, *rev. denied*, 193 Wn.2d 1029, 445 P.3d 561 (2019). Whether a sentence condition is related to the circumstances of a crime is an inherently factual question. *Id*. (citing *State v. Parramore*, 53 Wn.App. 527, 530, 768 P.2d 530 (1989)). In *Casimiro*, this Court, on appeal, declined to consider whether certain conditions were "crime-related" because the defendant agreed to the imposition of the conditions. *Casimiro*, 8 Wn.App. at 249. "Given [this] agreement to the conditions, there was no reason for the trial court or the parties to explain the relationship between the crime and the subsequent conditions." *Id*. Therefore, the Court declined to consider the defendant's arguments that some of his conditions were not crime-related. The Court should do the same here. Hudson stipulated to all the conditions set forth in the plea agreement and to any suggested by the DOC Pre-Sentence

Investigator. CP 22. He also stipulated that any such conditions were "crime-related." As such, Hudson cannot now challenge this condition as unrelated to the crime. *See Casimiro, supra.* Further, this Court may enforce a plea agreement term and order specific performance of the plea agreement, which bars Hudson from seeking appeal or collateral review of his conviction and sentence, to include conditions of his sentence. *See State v. Wiatt*, 11 Wn.App.2d 107, 455 P.3d 1176 (2019).

Hudson's claim fails.

CONCLUSION

Based on the arguments above, this Court should affirm the trial court's sentencing of Hudson.

DATED this 11th day of May, 2020.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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